

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY GLENN GARLAND,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2007

No. 264285  
Wayne Circuit Court  
LC No. 90-000648-01

Before: O’Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of more than 50 grams, but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii), and sentenced to five to ten years’ imprisonment. We affirm.

Defendant asserts the trial court erred by denying his motion to suppress testimony regarding an audiotape recording of a police run of the reported carjacking of the vehicle defendant was in when stopped by police and subsequently arrested. A trial court’s ruling on a motion to suppress is reviewed de novo. *People v Van Tubbergen*, 249 Mich App 354, 359-360; 642 NW2d 368 (2002). Factual findings by the trial court are reviewed for clear error with deference given to the trial court’s resolution of factual issues. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

Specifically, defendant claims that any evidence obtained from the police stop should have been suppressed because the prosecution violated an order requiring preservation of the audiotape of the police radio run. Defendant asserts that police testimony that the audiotape of the radio run did not exist was neither reliable nor believable.

Defendant reasons that the trial court should have granted his motion to suppress because the arresting officer’s testimony at trial conflicted with his testimony at the preliminary examination regarding how he received the information on which he based his decision to stop defendant’s vehicle. The arresting officer testified at the preliminary examination that he received information regarding a suspected carjacking through a police radio run, which should have been recorded as a matter of routine procedure. However, at trial, the officer testified that he received information about the carjacking from the precinct desk sergeant while at the station house, which a supervising officer confirmed, with additional information received while in his patrol car from a separate, unrecorded, police channel.

This Court stated in *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983), that in a motion to suppress, “[r]esolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge’s resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict.” The trial court thoroughly explored the issue of whether the contested audiotape existed and elected to believe the testimony of the police officers that no such tape existed. This Court gives deference to the trial court’s decision to accept the officers’ testimony. *Id.*

Defendant next argues that his conviction was against the great weight of the evidence. A new trial may be granted if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). “The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Id.* at 637. “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 638, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

The elements of possession of cocaine under MCL 333.7403(2)(a)(iii) are that the substance is cocaine, the cocaine mixture weighs between 50 grams and 225 grams,<sup>1</sup> defendant was not authorized to possess it, and defendant knowingly possessed it. See *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003) (discussing the elements of possession of less than 50 grams of cocaine with intent to deliver). Defendant contends that his testimony was clear and straightforward, in contrast to the inconsistent statements of the arresting officer. Hence, defendant argues that the trial court should have believed his assertion that police found the baggie of cocaine in the car and not on defendant’s person. The only reasoning offered by defendant in support of this claim is that police followed defendant’s vehicle for one-half block before stopping him, and any person in possession of cocaine would have attempted to discard the drugs before police could have executed the stop.

Defendant claims the trial court erred by believing the testimony of the arresting officer. Defendant points out that the officer was mistaken regarding which car seat defendant was in when pulled over, and changed his testimony between the preliminary examination and the trial regarding how he initially received information regarding the carjacking. According to defendant, the officer either committed perjury or was mistaken regarding these important facts. Therefore, defendant claims that the officer’s testimony that defendant possessed cocaine was not sufficiently reliable to prove beyond a reasonable doubt that defendant committed the charged offense.

In effect, defendant is asking this Court to make a determination that the trial court erred in assessing the credibility of a witness. However, this Court gives deference to the trier of fact to determine witness credibility. *Burrell*, *supra* at 448-449. The trial court elected to believe the

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<sup>1</sup> MCL 333.7403(2)(a)(iii) now requires possession of between 50 and 450 grams of a controlled substance. Defendant was convicted in 1990, but was not sentenced until 2005.

officer's testimony that he found 124.45 grams of cocaine in defendant's possession. Hence, the evidence did not preponderate against the verdict and, therefore, the trial court did not err in finding defendant guilty of possession of cocaine, in violation of MCL 333.7403(2)(a)(iii).

Defendant also argues that he was denied the effective assistance of counsel. When reviewing a preserved claim of ineffective assistance of counsel, this Court's review is limited to facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The trial court's factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Toma, supra* at 302. A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Id.*

Defendant claims his counsel was ineffective because counsel did not file a motion to dismiss based on the prosecution's failure to produce the police audiotape of the radio run, which led to the stop of defendant's vehicle. Trial counsel argued at length that the evidence procured from the vehicle stop should have been suppressed because the prosecutor failed to comply with the order to produce the audiotape of the radio run. As observed by the prosecutor, this case could not have proceeded if the trial court had granted the motion to suppress, and therefore, the motion to suppress served as the equivalent of a motion to dismiss. Even after the court ruled that no audiotape existed, defendant's counsel attempted to impeach the arresting officer regarding conflicting testimony that he gave at the preliminary examination about receiving information over the police radio. Furthermore, when the prosecution rested, defendant's counsel renewed his motion for suppression of the evidence.

Defendant next claims that counsel was ineffective because he did not demand that the court enforce the order for production of the audiotape of the police radio run. However, counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Counsel moved to suppress the evidence because of the missing police audiotape. Because of counsel's motion, the court questioned the officer-in-charge to "ensure that the order has been complied with, if it in fact could be." After questioning the officer-in-charge, the court was satisfied that the tape did not exist. Defendant fails to explain how counsel could have demanded that the court enforce the order to produce the audiotape when the court found that the audiotape did not exist.

Defendant further claims that counsel failed to conduct a pretrial investigation, including failing to utilize a private investigator retained with defendant's funds to research and rebut evidence regarding the existence of a separate, unrecorded police radio channel. Notably, this Court's review is limited to facts on the record, and there is no indication within the record that

counsel failed to investigate the case or that any private investigator was employed using client funds, other than the allegations defendant made, without supporting evidence, in his motion for a *Ginther*<sup>2</sup> hearing. In addition, defendant's claim that counsel failed to utilize the private investigator to conduct pretrial research regarding the existence of a separate police radio channel is nonsensical, since the testimony regarding the existence of a separate channel was brought up for the first time at trial, not before trial. In a related argument, defendant asserts counsel was ineffective for failing to introduce evidence to rebut the arresting officer's testimony regarding the existence of a separate radio channel. However, defendant fails to identify the evidence counsel could have presented to rebut the existence of the separate radio channel or to support his assertion that the officer's testimony, regarding the separate radio channel, was fabricated.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Henry William Saad  
/s/ Michael J. Talbot

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).